

No. 22,482

JUN 24 1949

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ACCURATE ELECTRIC CO. (GUAM), INC.,	}
<i>Appellant,</i>	
VS.	
GOVERNMENT OF GUAM,	
<i>Appellee.</i>	

APPELLANT'S OPENING BRIEF

On Appeal from the District Court of Guam.

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JURISDICTION.

This appeal is from an adverse judgment to appellant in an action filed in the District Court of Guam on April 10, 1967. In this action, appellant seeks refund of Guam income taxes for the years ended February 29, 1960, February 28, 1961, and February 28, 1962.

The District Court of Guam has jurisdiction of the cause under §1241i(h)(2) of Title 48, United States Code. Judgment adverse to appellant was en-

tered on October 9, 1967, motion for new trial was filed October 11, 1967, which was denied October 25, 1967, and notice of appeal was filed November 2, 1967. Jurisdiction is conferred on the United States Court of Appeals for the Ninth Circuit by §§41, 1291, and 1294 of Title 28, United States Code.

STATEMENT OF FACTS.

Appellant is a Guam corporation who at all times pertinent to the action below was an electrical contractor in Guam. By common stock ownership, appellant was affiliated with a similarly named California corporation. In 1958 the California corporation entered into a contract with Empire Gas & Engineering Co. to perform certain electrical construction work in Guam, for Empire, who was a general contractor having prime contracts with the Navy for construction work in Guam. Thereafter, the California corporation assigned the labor portion of its subcontract with Empire to Appellant (R.T. 6-7). This apparently has never been disputed by the Government of Guam and is not at issue in this appeal. At the same time the California corporation assigned the material portion of these subcontracts to a Hong Kong corporation known as Land Sales of America, Inc. (R.T. 5-6). Thereafter, for the years involved, appellant performed the labor portion of the contracts and duly filed corporate income tax returns with the Government of Guam. These returns included income derived

from the labor portion of the subcontracts and, as well, mistakenly included income derived from performance of the material subcontract (R.T. 22).

In 1964 as a result of audits in California by auditors of appellee, a claim was made against appellant for Guam Business Privilege Taxes arising out of the material subcontract. At that time the contention was made by appellee that the material portion of the subcontract was subject to Guam Business Privilege Taxes. Thereafter, these taxes were abated (Pl. Ex. 4). Appellee's auditor suggested that appellant should file amended returns for the years in question since the tax returns, as filed, which included the material portion, were inconsistent with a determination made that the material part of the contract was not performed by appellant (Pl. Ex. 13).

Thereafter, amended returns were filed which omitted the cost of these goods and the sales price together with the net profit realized from the materials portion of the contract (Pl. Ex. 7, 8, 9). At the trial, appellee conceded the profit was taxable to the corporation receiving it (R.T. 36-37).

Claims for refund on the basis of the amended returns were duly filed.

Subsequently appellee proposed certain deficiencies based upon the amended returns. Appellant did not

file a redetermination proceedings but instituted the action below for refund of income taxes.

QUESTIONS PRESENTED.

1. Did the court err in finding that the materials subcontract was performed by appellant when all the evidence demonstrated and appellee conceded that such subcontract was originally assigned to a corporation not a party to the action?

2. Can the trial court make findings of fact with respect to issues not raised by the parties in the pleadings or in the trial of the case?

3. Is the Government of Guam estopped to apply a different determination of facts with respect to income taxes than it has previously applied with respect to Business Privilege Taxes?

4. Is it an abuse of discretion to refuse to grant a new trial when:

(a) the moving party was surprised and in effect misled into not producing all of the original books and records pertaining to the litigation;

(b) the production of such evidence was not requested by the court at pretrial, nor by the respondent Government of Guam at any stage of the proceedings;

(c) the appellee never contended throughout any of the proceedings either prior to or in the midst of litigation that the maintenance of such records outside Guam had any bearing on the taxable issues involved?

SPECIFICATIONS OF ERRORS RELIED ON.

1. The District Court of Guam erred in finding that there was no effective assignment of the material portion of the Empire Gas electric subcontract by Accurate Electric Co. (Calif.) to Land Sales, Inc.

2. The District Court of Guam erred in finding that Accurate Electric Co. (Guam) purchased any materials for its own account.

3. The District Court of Guam erred in finding that Accurate Electric Co. (Calif.) made an effective assignment of the material portion of said electric subcontract to Accurate Electric Co. (Guam).

4. The District Court of Guam erred in holding that said Accurate Electric Co. (Guam) was taxable for both the material and labor portions of said subcontract.

5. The District Court of Guam erred in refusing to grant appellant's motion for a new trial on the grounds of surprise and excusable neglect.

ARGUMENT.

I.

THE CONTRACT WAS AWARDED TO A CALIFORNIA CORPORATION AND ONLY THE LABOR SUBCONTRACT ASSIGNED TO APPELLANT.

It is quite apparent that the court overlooked a vital and controlling fact which is not in dispute, is uncontraverted in the documentary evidence, and which requires reversal. That fact is simply which of the three corporations; appellant, the California corporation, or the Hong Kong corporation, had in fact the subcontracts for the materials with Empire Gas. The documentary evidence shows that Empire Gas awarded the subcontracts, both labor and material, to the California corporation. Appellant's contention is that the California corporation awarded the disputed part of the contract to a Hong Kong corporation. The Government contended that this assignment was questionable and placed into issue the question of assignment. Both the court and appellee, however, failed to consider the actual facts of the situation in that if the assignment was deemed to have been effective, then appellant is correct and the material part of the contract was with the Hong Kong corporation. If the assignment was not valid as contended by appellee, then the material portion of the contract stayed with the California corporation who was awarded the contracts in the first instance.

Therefore, whether the assignment was valid and effective is not material to the determination of the issues so far as the appellant was concerned. If the assignment was effective, the Hong Kong corporation was the material contractor or subcontractor. If the assignment was not effective, then that part of the contract remained with the California corporation and the deficiency assessment as well as the collection of taxes on that part of the contract against appellant was in error.

II.

APPELLANT'S BOOKS WERE KEPT AND AUDITED BY APPELLEE IN CALIFORNIA. NO FACTS JUSTIFYING DISREGARD OF CORPORATE ENTITIES WERE EITHER PLEADED OR PROVED. THE COURT ERRED IN REFUSING TO GRANT A NEW TRIAL.

Appellee did not at any time, either before or after the below action was instituted, assert that the deficiencies were asserted, or that the claims for refund were denied, on the ground that appellant's books and records were not maintained in Guam, or that the corporate entities should be disregarded as fraudulent devices to evade taxes. There is nothing in the record before the court to justify the court's findings disregarding the corporate entities. *Commissioner of Internal Revenue v. Eldridge* (9 Cir. 1935), 79 F. 2d 629, 102 ALR 500. It is clear from the findings of fact in this regard that the court was in error in these

findings and was in error in the conclusions of law based thereon. Since the findings were contrary to uncontradicted evidence, they are subject to free review unaffected by any presumption upholding them. *Carter Oil Co. v. McQuigg* (7 Cir. 1940), 112 F. 2d 275.

It is apparent that the court relied heavily upon the fact that appellant's books and records, as well as those of the California and Hong Kong corporations, were not maintained in Guam (R.T. 68). Although the California and Hong Kong corporations concededly had contracts with Guam in a minimal legal sense, there is no legal or factual reason why these corporations should maintain separate books and records on Guam.

The court inconsistently indicated that the presence of the original books and records were necessary to render a decision (R.T. 68), while stating that appellee was bound by whatever appellant's witnesses said the books showed (R.T. 63). In its motion for a new trial, appellant offered to produce these records and the motion was denied. An order denying a motion for a new trial is reviewable when the judge acts under a mistake of law or abuses his discretion. *Pool v. Leone* (C.A. Colo. 1967), 374 F. 2d 961.

Appellee elected not to attend the depositions of Mr. Faris and his accountant, and did not advise or

request of counsel that these records be produced. The pretrial order is silent on the production of these documents. Appellant was, therefore, justified in assuming and concluding that the testimony taken and the documents offered were sufficient to establish its case on the issues as framed by the pretrial order and the other pleadings.

III.

THE AMENDED RETURNS WERE FILED AT APPELLEE'S SUGGESTION THAT THE MATERIALS SUBCONTRACT BE DELETED.

The basis for appellant's claims for refund arises out of deletion of \$141,000.00 profit realized from the materials subcontract. This materials subcontract was deleted from the amended returns at the suggestion of Mr. P. A. Kar after audit of appellant's books in California (Pl. Ex. 13). Appellee conceded the profit realized from the materials subcontract was not taxable to appellant. This is apparent from the testimony of Mr. Frank Hassell which appears in the record as follows:

"Q. What you are saying is that if the material contract involved any profit the profit should have been taken into Guam, Accurate Electric (Guam) instead of Land Sales.

"A. Not necessarily. It should have been taken by the profit, by the corporation which realized it.

“Q. All right, then, if Land Sales realized it isn't it correctly taken out of the amended tax return?

“A. That is correct. Whatever corporation realized the income would be taxable by Guam for having done business in Guam.”

(R.T. 36-37)

“Q. All right. And you are contending if there was an element of profit upon the material contract, it should have been to Accurate Electric (Guam)?

“A. No, I do not. I contend it was taxable to whatever corporation realized that profit.

“Q. But we are only concerned now with Accurate Electric (Guam), aren't we?

“A. That's true.”

(R.T. 39)

Appellee conceded that the only evidence they had after audit of appellant's books that the \$141,000.00 profit was ever paid to appellant was the filing of the original returns which, if course, were in error on that point (R.T. 44-45).

Further, appellee used appellant's amended returns in assessing a deficiency based upon income shown in the original returns.

“Q. But isn’t it a fact that the report signed by Mr. Maddox and dated April 6, 1965, Exhibit 12 for the plaintiffs, shows in regards to that year that the difference was computed by taking the income from the original return and then disallowing certain deductions and allocations of overhead on the amended return? Now wasn’t this consistently done?

“A. That is, generally speaking, true.”

(R.T. 60)

IV.

THE COURT ERRONEOUSLY CONSIDERED THE APPELLEE’S DEFICIENCY ASSESSMENT FINAL AND UNCONNECTED WITH THE ISSUES RAISED BY APPELLANT’S CLAIM FOR REFUND.

After the claims for refund were filed based upon the amended returns filed by appellant, appellee assessed a deficiency. Since the claims were already on file and concerned the same subject matter, no complaint was filed with the District Court sitting as a Tax Court pursuant to §19700 of the Government Code. The court erroneously assumed that appellant’s failure to appeal to the Tax Court side of the District Court conclusively determined the issue of the deficiency.

However, since the claims for refund were filed long before the deficiency assessment, the court should

have considered the deficiency assessment as an integrated matter. Internal Revenue Code, §7422(e). Had it done so, it is quite obvious that the deficiency assessment could not have been sustained. Deductions and expenses were deleted in the amended returns which were related to the materials subcontract. The profit from the materials subcontract was also deleted. The Government then assessed a deficiency based upon the deletion of expenses and deductions from the amended returns and the inclusion of the profit from the materials subcontract as stated in the original returns. Obviously, since the appellee had rejected the amended returns, it could hardly assess a deficiency by using figures from both the original and the amended returns to its own advantage and the prejudice of the appellant (R.T. 60).

CONCLUSION.

There is no evidence to sustain the findings of the District Court. Assuming that there was a lack of evidence on the part of appellant to thoroughly convince the District Court of the correctness of its position, the appellant was nevertheless precluded from introducing such evidence consisting of the books and records of the corporation.

Appellant did carry the burden of proof on all issues raised by appellee in its answer and those set

forth in the pre-trial order. There is no contradictory evidence and the important issues are in fact conceded by appellee. It is, therefore, respectfully submitted that the judgment should be reversed.

Dated June 14, 1968, at Oakland, California.

Respectfully submitted,

BARRETT & FERENZ

By W. SCOTT BARRETT

Attorneys for Appellant

CERTIFICATE.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19^{and 39} of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with those rules.

W. SCOTT BARRETT

APPENDIX

A P P E N D I X

EXHIBITS.

No.	Marked	Received	Description
1	5	5	Letter, 8-30-67, Magee to Ferenz
2	5	5	Waivers, Minutes of Board, Accurate (California), March 1958 thru August, 1958
3	8	8	Purchase orders, Empire Gas Engineering Co., and Agreements, Minutes of of Board, Accurate (California)
4	9	9	Copy, letter, 1-14-66, Tax Div. Gov. Guam to Faris
5	9	9	Supplemental Report, 4-22-65, Tax Audit Div., Gov. Guam
6	9	9	Report, 4-22-65, Tax Audit Div., Gov. Guam
7	16	9	Amended Return, Accurate (Guam), 3-1-60 to 2-28-61
8	16	9	Amended Return, Accurate (Guam), 3-1-61 to 2-28-62
9	16	9	Amended Return, Accurate (Guam), 3-1-62 to 2-28-63
10	28	9	Supplemental Report, 3-23-65, Tax Audit Div.
11	28	9	Report, 3-23-65, Tax Audit Div. Gov. Guam
12	28	9	150-day Letter, with computations, 4-6-65
13	51	52	Copy, letter, 4-7-64, Tax Div. to Faris
A	53	55	Amended Tax Return, Accurate (Guam), 3-1-59 to 2-28-60
B	53	55	Tax Return, Accurate (Guam), 3-1-60 to 2-28-61
C	53	55	Tax Return, Accurate (Guam), year ending 2-28-62
D	53	55	Tax Return, Accurate (Guam), 3-1-62 to 2-28-63
E	53	55	Tax Return, Accurate (Guam), 3-1-63 to 2-29-64
F	53	55	Transcript of Account, Accurate (Guam)

